DOCTRINE OF SEPARATION OF POWERS IN INDIA

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Abstract: The doctrine of separation of powers, which was systematically developed by Montesquieu, is always in debate because of transgression of one organ of the State in another organ's jurisdiction or area of assigned work. It is a very significant concept as it is based on the cardinal canon of preserving and protecting the liberty of individual by mutually confining the various organs of government in its sphere. Though, this doctrine was refused to be strictly applied in India by the Constituent Assembly but later the circumstances compelled the Supreme Court of India to declare this doctrine as a part of basic structure of the Constitution. This paper attempts to give an idea of application of this doctrine in India.
Keywords: Separation of Powers, Parliamentary System, Constitution of India.

Introduction:

With the demise of Police State, the welfare state came into being which is based on the just and reasonable concept of welfare of the common people. This object of welfare state has led to multiplicity of the functions of the state. In this respect, the state started taking care of its people from cradle to grave. The result of this looking after attitude of state's government set up is germination of administrative machineries. These agencies have been given immense power to translate the vision of welfare state into reality. For this purpose, they have been given discretionary powers of numerous nature like legislative, executive and judicial. This attitude of concentrating all these functions of government in one hand has put a question mark on the relevance of doctrine of separation of powers. An attempt, in this paper, has been made to unearth the relevancy and need of this doctrine in India.

Separation of Powers: Origin and Concept

Though centuries before Montesquieu a cardinal of Germany named Nikolaus von Kues (1401-64) suggested separation of legislature, executive and judiciary.[1] The name most associated with the doctrine of separation of powers is that of Charles Louis de Secondat, Baron Montesquieu. His influence upon later thought and upon the developments of institutions for outstrips, in this connection, that of any of the earlier writers we have considered. It is clear, however, that Montesquieu did not invent the doctrine of the separation of powers, and that much of what he had to say in Book XI Chapter 6 of the De L'Espirit des Lois was taken over from contemporary English writers, and from

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[1] German News Weekly, September 5, 1964, p. 3 quoted in : B.L. Garg, "Problem of Separation of Judiciary in India", (1964) Vol. 25 *Indian Journal of Political Science* 331-338 at 331.

John Locke. Montesquieu, it is true, contributed new ideas to the doctrine; he emphasized certain elements in it that had not previously received such attention, particularly in relation to the judiciary, and he accorded the doctrine a more important position that did most previous writers. However, the influence of Montesquieu cannot be ascribed to his originality in this respect, but rather to the manner and timing of the doctrines development in his hands.[2]

Montesquieu described the form of government as follows:

> THERE are three [s]pecies of government; the republican, monarchial and de[s]potic. In order to di[s]cover their nature, it is [s]ufficient to recollect the common notion, which [s]uppo[s]es three definitions, or rather three facts: that a republican government is that in which the body, or only a part of the people, is po[ss]e[ss]ed of the [s]upreme power; a monarchial, that in which a [s]ingle per[s]on governs by fixed and e[s]tabli[s]hed laws: a de[s]potic government that in which a [s]ingle per[s]on, without law and without rule, directs everything by his own will and caprice.[3]

Further, he said that:

> "IN every government there are three (s)orts of power: the legi(s)lative; the executive, in re(s)pect to things dependent on the law of nations; and the executive, in regard to things that depend on the civil law.
> By virtue of fir(s)t, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogate tho(s)e that have been already enacted. By the (s)econd, he makes peace or war, (s)ends or receives emba(ss)ies; establishes the public (s)ecurity, and provides again(s)t inva(s)ions. By the third, he puni(s)hes criminal, or determines the di(s)putes that ari(s)es between individuals. The latter we (s)hall call the judiciary power, and the other (s)imply the executive power of the (s)tate.
> The political liberty of the (s)ubject is a tranquility of mind, ari(s)ing from the opinion each per(s)on has of his (s)afety. In order to have this liberty, it is requisite the government be (s)o con(s)tituted as one man need not be afraid of another.
> When the legislative and executive powers are united in the (s)ame per(s)on, or in the (s)ame body of magi(s)trates, there can be no liberty; because apprehensions may arise, left the same monarch of (s)enate (s)hould enact tyrannical laws, to execute them in a tyrannical manner.

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[2] M.J.C. Vile, *Constitutionalism and the Separation of Powers*. (Oxford : Clarendon Press 1967) at 76.
[3] Montesquieu, *The Spirit of Laws*, (*Translated from French*) Vol. I Fifth ed. (Edinburgh: Silverster Doig, Royal Exchange) Book II, Chapter 1 at 8.

> Again, there is no liberty, if the power of judging be no (s)eparated from the legi(s)lative and executive powers, were it joined with the legi(s)lative, the life and liberty of the (s)ubject would be expo(s)ed to arbitrary control; for the judge would then be the legi(s)lator were it joined to the executive power, the judge might behave with all the violence of an oppre(ss)or.
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> There would be an end of everything, were the (s)ame man, or the (s)ame body, whether of the nobles or of the people to exerci(s)e tho(s)e three powers, that of enacting laws, that of executing the public re(s)oluions, and that of judging the crimes or differences of individuals."[4]

Moderation was chief purpose of Montesquieu's doctrine. For proper running of a State, there are, generally, three essential powers that are required by a government: the power to make laws, the power to put the laws into effect and the power to enforce the laws. In other words, governmental powers may be classified by function in threefold: (1) legislative, the enactment of laws; (2) executive, the application of laws; and (3) judicial, the enforcement of laws through legal process. However, sometimes this classification takes other forms also. It has been said that simple two-fold classification of policy making and policy executing is the most realistic description.

This doctrine has been defined by other authorities as under:

E.C.S. Wade and G. Godfrey Phillips: The concept of separation of powers may mean at least three different things[5]:

(i) that the same person should not form part of more than one of the three organs of the government, for example that ministers should not sit in Parliament;
(ii) that one organ of government should not control or interfere with the work of another, for example that the judiciary should be independent of the Executive or that ministers should not be responsible to Parliament;
(iii) that one organ of government should not exercise the functions of another, for example, that ministers should not have legislative powers.

M.J.C. Vile: It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive or judicial. Each branch of government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way

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[4] Montesquieu, *The Spirit of Laws*, (*Translated from French*) Vol. I Fifth ed. (Edinburgh: Silverster Doig, Royal Exchange) Book XI, Chapter VI, at 164-165.

[5] Wade and Philips, *Constitutional and Administrative Law*. Ninth ed. (London: Longman Group Limited 1977) at 48.

each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State.[6]

C.F. Strong: The theory of separation of powers… means the complete isolation of the three departments from one another, but that, in a broader sense, it means merely that the three powers shall be in separate hands.[7]

D.D. Basu: The modern interpretation of the doctrine of separation of powers, therefore, is that one organ or department of government should not usurp the functions which essentially belong to another organ.[8]

Jagdish Swarup: The theory, that the legislative, judicial and executive functions should be performed by different bodies of persons– that department should be limited to its own sphere of action without encroaching upon the others and that it should be independent within that spheres, is called the theory of separation of power.[9]

Purpose of Separation of Powers:

The idea behind this doctrine is that if one person or body had control of two or more of these powers, their abuse would result in oppressive laws, the arbitrary enforcement of these laws and consequently, tyranny within the state. This is because one person would be able to make what laws he wished, have the power to put them into effect and also enforce them. It is thought that by keeping the three powers separate, each organ will act as a check or a balance against the other organs using their powers wrongfully.

Justice Brandies (dissenting) in *Myers* v. *United States*[10], observed that the doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to void friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

The aim of the separation doctrine is to guard against tyrannical and arbitrary powers of the state. Though, in face of the complex socio-economic problems demanding solution in a modern state, it may no longer be possible to apply the separation theory strictly, nevertheless, it has not become redundant and its chief value lies in emphasizing that it is essential to develop adequate checks and balances to prevent administrative arbitrariness. Thus, Jaffe and Nathanson has stated that: "Its object is the preservation of political safeguards against the capricious exercise of power; and incidentally, it lays down the broad lines of an efficient division of functions. Its logic is the logic of polarity rather

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[6] M.J.C. Vile, *Constitutionalism and the Separation of Powers*. (Oxford : Clarendon Press 1967) at 13.

[7] C.F. Strong, *Modern Political Constitutions*. (London: Sidgwick and Jackson Limited 1963) at 13.

[8] D.D. Basu, *Commentary on the Constitution of India*, Vol. 2 (Calcutta: S.C. Sarkar and Sons (Pvt.) Ltd. 1962) at 326.

[9] Jagdish Swarup, *Legislation and Interpretation*. (Allahabad: Dandewal Publishing House 1974) at 579.

[10] 272 US 52, 293, 47 S.Ct. 21, 84-85, 71 L.Ed. 160 (1926)

than strict classification … the great end of the theory is, by dispersing in some measures the centres of authority, to prevent absolutism."[11]

Professor Sutherland has described the purpose of this doctrine as: "Without the separation of powers, without the institution of an independent judiciary, without a champion furnished by government against government, constitutional rights would become 'ghosts' that are seen in the law, but that are elusive to the grasp."[12]

Separation of Powers in other Countries:

U.S.A.- The American people were influenced toward the principles of separation of powers both by the writings of Locke and Montesquieu and by their own political experience. Nearly every educated American of the revolutionary period was familiar with the writings of Locke and Montesquieu, and it was easy to find in American political experience, both before and after the revolution, persuasive evidence that these writers were sound on the theory of separation of powers. The swollen powers of the royal governor had been a leading cause of the difficulties between the colonies and the home government, and the over connection of power in the legislature came to be regarded as one of the chief weaknesses of government in the critical period following the revolution. In the pre-revolutionary colonial system, however, there had been some separation of powers, both the legislatures and the judiciary having enjoyed certain independent powers and a partially independent status. It was easy to conclude that a more complete separation would have been much better. The growing popularity of this idea was prominently reflected in the Massachusetts constitution of 1780. When the Philadelphia convention met in 1787, it was accepted without much question. (Chester C. Maxey)[13].

This doctrine is embodied in the opening sentences of the first three Articles of the American Constitution, commonly called the distributive clause, mentioned below:

> Section I of Article I: "All the legislative powers herein granted shall be vested in a Congress of the United States…"
> Section I of Article II: "The executive power shall be vested in a President of the United States of America".
> Section I of Article III: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish …".

Thus, the foundation of the threefold or tripartite plan – a government composed of three separate, independent and co-ordinate branches- was laid down. The

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[11] Jaffe and Nathanson, *Administrative Law: Cases and Materials* 38 (1961) quoted in: M.P. Jain and S.N. Jain, *Principles of Administrative Law*. (Nagpur: Wadhwa and Company 1986) at 23.

[12] Arthur E. Sutherland quoted in : Ronald Young, *American Law and Politics: The Creation of Public Order*. (New York: Harper & Row, Publishers 1967) at 139.

[13] M.J.C. Vile, *Constitutionalism and the Separation of Powers*. (Oxford : Clarendon Press 1967) at 179.

same principles of organization eventually became universal in state government and spread extensively downward into city, country and other units of local government.

In *Kilbourn* v. *Thompson*[14], American Supreme Court observed that it is essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.

But the experience has revealed that even in USA any rigid separation of powers is impracticable. The problems of government are interdependent. As Woodrow Wilson realized it : "The trouble with the theory is that government is not a machine, but a living thing … no living thing can have its organs offset against each other as checks, and live … Government is not a body of blind forces; it is a body of men with highly differentiated functions, no doubt, in our modern day of specialization, but with a common task and purpose. Their co-operation is indispensable; their warfare fatal."[15]

The modern interpretation of the doctrine of separation of powers is that one organ or department of government should not usurp the functions which essentially belong to another organ. Thus the formulation of legislative policy or the general principles of law is an essential function of the legislature and cannot be usurped by the executive. The form of government has no final effect upon the application of the doctrine, though it may limit the extent of its application.

United Kingdom-In Great Britain, which formed the model for Montesquieu's theory of the separation of powers, this principle has never been accorded a constitutional status, nor has it ever been theoretically enshrined. Montesquieu was confused in his experience of England. In England, relatively speaking there was more liberty for citizens as compared to the French of the time not because there was 'separation of powers' but because the people had struggled for it and at best in England there was sharing of powers between the King and the people not the separation of powers.

According to great English Jurist Blackstone, who was supporter of doctrine of Montesquieu, "wherever the right of making and enforcing the law is vested in the same man or one and the same body of men, there can be no public liberty."[16]

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[14] 103 U.S. 168 (1880)

[15] Woodrow Wilson, *Constitutional Government in US* (1908), p. 56 quoted in : *Supra* note 8 at 325.

[16] Blackstone, *Commentaries*, Vol. I, p. 269 quoted in : D.D. Basu, *Commentary on the Constitution of India*. Vol. 2, Fourth edition (Calcutta: S.C. Sarkar & Sons (Pvt.)Ltd. 1962) at 324.

Britain has adopted parliamentary system of government. So, there rigid separation of powers is not possible although the organs of government are easily distinguishable as –

(i) The legislature, which consists of the Queen, the House of Lords and the House of Commons.
(ii) The Executive, which consists of the cabinet, the Ministers of the Crown, the government departments and the civil service.
(iii) The judiciary, which consists of the Courts of law and the judges, who sit in them.

In Britain, there is only evidence of a true separation of powers that is in the virtual independence of the judiciary. The legislature and the executive function more by co-operation than separation. In many areas, they overlap and rely on each other. As *James Dunbar-Brunton* (The Law and the Individual) has given examples of connections between the three organs of government which offend the doctrine of separation of powers are[17]:

1. The monarch is the nominal head of all three organs of government. The legislature consists of the Queen in Parliament; the executive is known as Her Majesty's government, or the Crown; and the judiciary consists of the Queen's Courts and Judges.
2. The office of the Lord Chancellor spans all three organs. He presides over the House of Lords in its legislative work. He occasionally sits with the Law Lords in the judicial function of the House of Lords and is the actual head of the judiciary. Furthermore, he is a member of the executive and holds a position in the cabinet.
3. Parliament frequently delegates its legislative powers to the executive.
4. Parliament often confers judicial powers on the executive by giving ministers or tribunals powers to hear disputes between the individual and the State.

Donoughmore Committee has aptly remarked that in the British Constitution there is no such thing as the absolute separation of legislative, executive and judicial powers. In practice, it is inevitable that they overlap. In fact, in Britain, doctrine of separation of powers is conspicuous by its absence.[18]

Separation of Powers: Indian Scenario

In Indian legal framework, the doctrine of Separation of Powers has found a partial acceptance. Although, the term separation of powers is nowhere used in the Constitution of India but the combined effect of the interpretation of different provisions of Constitution reveals the essence of the doctrine of separation of powers.

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[17] James Dunbar-Brunton, *The Law and the Individual*. First ed. (London: The MacMillan Press Ltd. 1973) at 16.
[18] Quoted in : Tej Bahadur Singh, "Principle of Separation of Powers and Concentration of Authority", (2001) *AIR Journal* 163-170 at 164.

Constituent Assembly Debates:

Though, in Constituent Assembly, on 24th November 1948 an Article 39-A (Draft Constitution) was proposed by honorable Dr. B.R. Ambedkar which was indirectly related to the doctrine of separation of powers (Article 50 of the present Constitution of India) but for complete separation of powers a new Article 40A (Draft Constitution) was proposed by Prof. K.T. Shah on 10th December 1948. Due to importance of this doctrine, a hot debate took place in the Constituent Assembly. This proposed new Article was as follows –

> "***40-A*** : There shall be complete separation of powers as between the principal organs of the state, viz., the Legislature, the Executive, and the Judicial."

In Constituent Assembly this article was supported by Kazi Syed Karimmudin and opposed by K. Hanumanthaiya, Shibban Lal Saxena, K. Santhanam and B.R. Ambedkar. Describing the importance of separation of powers doctrine Prof. K.T. Shah said, "… if you maintain the complete independence of all the three, you will secure a measure of independence between the judiciary, for example, and the Executive, or between the Judiciary and the Legislature. This, in my view, is of the highest importance in maintaining the liberty of the subject, the civil liberties and the rule of law… If contact or connection is maintained between the Judiciary and the Executive organs of the state there is also the possibility of undue influence, of misleading, of misdirecting and mis-influencing those who are appointed to interpret the Constitution, those who are appointed to be guardians of civil liberties, those who have to administer justice."[19]

Prof. Shah gave example of separation of powers in USA where this doctrine has worked for over a hundred and fifty years quite satisfactorily, where the legislature, the executive and the Judiciary are kept wholly apart.

Prof. Shah's proposal was opposed by Shri K. Hanumanthaiya because "this House is wedded to a parliamentary system of democracy and this new clause is out of place in such a constitutional structure."[20] Hanumanthaiya said, "… we have come to accept the parliamentary system to be suitable to this country and for every good reasons that system seems to be better adapted to conditions in India than Presidential executive. I think instead of having a conflicting trinity it is better to have a harmonious governmental structure." Further he said, "The powers of governing should vest with one set or people and it is unsafe for us to divide it into three equal parts and especially in the extreme degree that Prof. K.T. Shah contemplates. Even in America, though theoretically there is complete separation of powers between these three departments, we all know the party system of Government softens its rigours to a very great extent."[21]

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[19] C.A.D., Vol. 7, at 960.
[20] C.A.D., Vol. 7, at 963.
[21] C.A.D., Vol. 7, at 962.

Shri K.M. Munshi said, "… the doctrine of separation of powers which was originally put forward by Montesquieu in the middle of the eighteenth century was the basis on which the Constitution of USA was framed. But the last 150 years of experience has shown that the doctrine of separation of powers cannot be maintained in a modern state … therefore, the doctrine of separation of powers is an exploded doctrine."[22]

In Constituent Assembly, the proposal for complete separation of powers, which was proposed by Prof. K.T. Shah, was negativated by Constituent Assembly.

Constitutional Provisions:

On simply analyzing the provisions of Indian Constitution we can say that doctrine of separation of powers is accepted in India. Under Indian Constitution at both level the Union and the States, the executive powers are with the President and the Governor, the legislative powers are with the Parliament and the State Legislatures and the judicial powers are with the Judiciary (the Supreme Court, the High Courts and Subordinate Courts). In *Golaknath* v. *State of Punjab*[23], Chief Justice Subba Rao stated that: "The Constitution brings into existence different constitutional entities, namely, the Union, the States and the Union Territories. It creates three major instruments of power, namely, the Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without over stepping their limits. They should function within the spheres allotted to them.

But, when we study carefully the constitutional provisions of Indian Constitution, it is clear that the doctrine of separation of powers in India, in its strict sense, is not accepted. There is no provision in the Constitution itself regarding the separation of powers among the three organs of government.

As *Upendra Baxi* has also said 'in India, the doctrine of separation of powers has not been accorded a constitutional status. Apart from the directive principle laid down in Article 50 which enjoins separation of judiciary from the executive, the constitutional scheme does not embody any formalistic and dogmatic division of powers.'[24]

Article 50 of Indian Constitution reads as under:

> The state shall take steps to separate the judiciary from the executive in the public services of the state.

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[22] C.A.D. Vol. VIII, at 219-220.
[23] AIR 1967 SC 1643
[24] Upendra Baxi, "Developments in Indian Administrative Law", p. 132-173 at 136, in : A.G. Noorani (ed.), *Public Law in India* (New Delhi: Vikas Publishing House Pvt. Ltd. 1982).

This directive is but an offshoot of the famous doctrine of separation of powers. The chief purpose of Article 50 is independence of judiciary. A free, independent and impartial judiciary is the pillar of any democracy. Law Commission of India, in 14th Report, Vol. II, Chapter 41, has described the real purpose of Art. 50 as, "… to ensure the independent functioning of the Judiciary freed of all suspicion of executive influence or control, direct or indirect. It incidentally ensures that officers will devote their time entirely to judicial duties and this fact leads to efficiency in the administration of justice."

Overlapping of Functions of State Organs:

The Indian Constitution merely states that "Executive power of the Union shall be vested in the President [Art. 53(1)] and "the executive power of the state shall be vested in Governor … "[Art. 154(1)]. All executive action of the Government of India shall be expressed to be taken in the name of the President [Art. 77(1)]". But there is no any express provision that legislative and judicial powers shall be vested in any person or organ. In India, there is not only a functional overlapping but there is personnel overlapping also.

India has adopted parliamentary system in which separation of the executive and the legislature is impossible. In India, the executive is the part of the legislature. President acts on the advice of Council of Ministers [Art. 74(1)]. He can be impeached by Parliament for violation of the Constitution [Art. 56(1)(b) with Art. 61].

The President being the executive head is also empowered to exercise judicial function as Article 103 empowers the President to decide cases of disqualification of members of the Parliament. Art. 103 reads as, "If any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in clause(1) of Article 102, the question shall be referred for the decision of the President and his decision shall be final." The same provision is under Art. 192 regarding Governor's power.

The President under Article 72 has also power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence –

(a) where the punishment or sentence is by a Court Martial;

(b) where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) where the sentence is a sentence of death.

The President also exercises judicial functions in appointment of judge [Art 124, 126, 127]. The President exercises the legislative function in the form of ordinance making power. Art. 123(1) says, "If at any time, except when both Houses of Parliament are in session, the President is satisfied that

circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require." When proclamation of emergency has been declared by the President due to failure of constitutional machinery, the President has been given legislative power under Article 357 of Indian Constitution to make any law in order to meet the situations. Under Art. 372(2) and Art. 372A of Constitution of India, a power has been conferred on the President to adopt any law in India by making such adaptations and modifications whether by way of repeal or amendment as may be necessary or expedient and to provide that the law so adapted or modified, shall have effect subject to adaptation and modifications so made and the adaptation and modifications shall not be questioned.

The Legislature besides exercising law-making powers exercises judicial powers also. For example, in case of removal of judges of Supreme Court an address must be passed by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two thirds of the members of the House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity [Art. 124(4)].

Further, in President's impeachment charge is made by one House of Parliament and second House investigate regarding charge. If resolution is passed by a majority of not less than two-thirds of the total membership of the second House declaring that the charge preferred against the President has been sustained, such resolution shall have the effect of removing the President from his office as from the date on which the resolution is so passed [Art. 61(4)]. Similarly, the Legislature's function is of judicial nature in cases of breach of its privileges.

The Judiciary also exercises legislative powers. Supreme Court and High Courts are empowered to make certain rules which are legislative in character. Whenever High Court or the Supreme Court finds a certain provision of law against the Constitution or public policy, it declares the same null and void. Sometimes, the High Court and Supreme Court formulate the principles on the point where law is silent. This power is also legislative in character. Apart from this, when judges establish a new principle by means of judicial decision, they may be said to exercise legislative power and not only judicial power. The High Courts in certain spheres perform functions which are administrative rather than judicial. Their power of supervision over subordinate courts is more of administrative nature rather than judicial [Art. 127].

Under Art. 143, the President may take opinion of Supreme Court on a question which is of public importance. Analyzing to this Article, it feels that Supreme Court is advisory body of Central Government.

A deep survey of Indian Constitution shows that doctrine of separation of powers does not exist in India as there is only separation of judicial and executive functions.

Separation of Powers as Basic Structure of Constitution:

As discussed above, the Constituent Assembly did not accept the proposal for having complete separation of powers between the State's organs. But, Hon'ble Supreme Court of India in *Kesavananda Bharati v. State of Kerala*[25], declared the separation of powers as a basic structure of Constitution which cannot be destroyed through amendment of the Constitution also. This unique change in attitude of Indian Judiciary took place, perhaps to strengthen its power and status or to establish judicial supremacy. Like, in *In: Re Delhi Laws Act* (1951) XIV SCJ 527 Justice Patanjali Sastri observed that the Constitution following the British model has effected a fusion of legislative and executive powers which spells the negation of any clear cut division of governmental power into three branches which is the basic doctrine of American constitutional law

In *Rai Sahib Ram Jawaya Kapur v. State of Punjab*[26], the Supreme Court held that the Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.

In *Jayantilal Amritlal Shodhan* v. *F.N. Rana*[27], regarding doctrine of separation of powers, Justice Shah observed that it cannot, however, be assumed that the legislative functions are exclusively performed by the Legislature, executive functions by the executive and judicial functions by the judiciary alone. The Constitution has not made an absolute or rigid division of functions between the three agencies of the state.

Thereafter, in *Minerva Mills Ltd.* v. *U.O.I.*[28], a five-judge Constitution Bench consisting Hon'ble Y.V. Chandrachud, C.J., P.N. Bhagwati, A.C. Gupta, N.L. Untwalia and P.S. Kailasam, JJ., pronounced judgment. Justice Bhagwati said that it is clear from the majority decision in *Kesavananda Bharati case* that our Constitution is a controlled Constitution which confers powers in the various authorities created and recognized by it and defines the limits of those powers.

Furthermore, in *P. Kannadasan* v. *State of T.N.*[29], a Division Bench consisting Hon'ble B.P. Jeevan Reddy and Suhas C. Sen, JJ. pronounced judgment. Justice Reddy said that our Constitution recognizes and incorporates the doctrine of separation of powers between three organs of the State, viz., the Legislature, the Executive and the Judiciary. Even though the Constitution has adopted the parliamentary form of government where the dividing line between

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[25] (1973) 4 SCC 225
[26] (1955) 2 SCR 225
[27] (1964) 5 SCR 294
[28] (1980) 3 SCC 625
[29] (1996) 5 SCC 670

the legislature and executive becomes thin, the theory of separation of powers is still valid.

The Constitutional Bench, consisting Hon'ble R.M. Lodha, CJI, H.L. Dattu, Chandramauli Kr. Prasad, Madan B. Lokur & M.Y. Eqbal, JJ. in *State of Tamil Nadu v. State of Kerala* [30], held that Indian Constitution, unlike Constitution of United States of America and Australia, does not have express provision of separation of powers. However, the structure provided in our Constitution leaves no manner of doubt that the doctrine of separation of powers runs through the Indian Constitution. It is for this reason that this Court has recognized separation of power as a basic feature of the Constitution and an essential constituent of the rule of law. On this issue, the Court summarized as under-

> (i) Even without express provision of the separation of powers, the doctrine of separation of powers is an entrenched principle in the Constitution of India. The doctrine of separation of powers informs the Indian constitutional structure and it is an essential constituent of rule of law. In other words, the doctrine of separation of power though not expressly engrafted in the Constitution, its sweep, operation and visibility are apparent from the scheme of Indian Constitution. Constitution has made demarcation, without drawing formal lines between the three organs - legislature, executive and judiciary. In that sense, even in the absence of express provision for separation of power, the separation of power between legislature, executive and judiciary is not different from the constitutions of the countries which contain express provision for separation of powers.
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> (ii) Independence of courts from the executive and legislature is fundamental to the rule of law and one of the basic tenets of Indian Constitution. Separation of judicial power is a significant constitutional principle under the Constitution of India.
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> (iii) Separation of powers between three organs – legislature, executive and judiciary – is also nothing but a consequence of principles of equality enshrined in Article 14 of the Constitution of India. Accordingly, breach of separation of judicial power may amount to negation of equality under Article 14. Stated thus, a legislation can be invalidated on the basis of breach of the separation of powers since such breach is negation of equality under Article 14 of the Constitution.
>
> (iv) The superior judiciary (High Courts and Supreme Court) is empowered by the Constitution to declare a law made by the legislature (Parliament and State legislatures) void if it is found to have transgressed the constitutional limitations or if it infringed the rights enshrined in Part III of the Constitution.
>
> (v) The doctrine of separation of powers applies to the final judgments of the courts. Legislature cannot declare any decision of a court of law to be void or of no effect. It can, however, pass an

[30] AIR 2014 SC 2407

> amending Act to remedy the defects pointed out by a court of law or on coming to know of it aliunde. In other words, a court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.
> (vi) If the legislature has the power over the subject-matter and competence to make a validating law, it can at any time make such a validating law and make it retrospective. The validity of a validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation law it removes the defect which the courts had found in the existing law.
> (vii) The law enacted by the legislature may apparently seem to be within its competence but yet in substance if it is shown as an attempt to interfere with the judicial process, such law may be invalidated being in breach of doctrine of separation of powers. In such situation, the legal effect of the law on a judgment or a judicial proceeding must be examined closely, having regard to legislative prescription or direction. The questions to be asked are, (i) Does the legislative prescription or legislative direction interfere with the judicial functions? (ii) Is the legislation targeted at the decided case or whether impugned law requires its application to a case already finally decided? (iii) What are the terms of law; the issues with which it deals and the nature of the judgment that has attained finality? If the answer to (i) to (ii) is in the affirmative and the consideration of aspects noted in question (iii) sufficiently establishes that the impugned law interferes with the judicial functions, the Court may declare the law unconstitutional.

In *NJAC Case (Supreme Court Advocates-on-Record - Association and another v. Union of India)*[31], the Supreme Court said that it is open to the Parliament, while exercising its power under Article 368, to provide for some other alternative procedure for the selection and appointment of Judges to the higher judiciary, so long as, the attributes of "separation of powers" and "independence of the judiciary", which are "core" components of the "basic structure" of the Constitution, are maintained.

The doctrine of separation of powers has become concrete in the Indian context when the Court in Kesavananda Bharati's case treated the same as a basic feature of the Constitution of India. … the concept of constitutional limitation is a facet of the doctrine of separation of powers. … there can really be no strait-jacket approach in the sphere of separation of powers when issues involve democracy, the essential morality that flows from the Constitution, interest of the citizens in certain spheres like environment, sustenance of social interest, etc. and empowering the populace with the right to information or right to know in matters relating to candidates contesting election. There can be many an example where this Court has issued directions to the executive and also

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[31] Writ Petition (Civil) No. 13 of 2015 decided on 16 October 2015

formulated guidelines for facilitation and in furtherance of fundamental rights and sometimes for the actualization and fructification of statutory rights. [32]

Supreme Court in *Dr Ashwini Kumar v. Union of India*[33], said that unlike Britain, India has a written Constitution, which is supreme and adumbrates as well as divides powers, roles and functions of the three wings of the State – the legislature, the executive and the judiciary. These divisions are boundaries and limits fixed by the Constitution to check and prevent transgression by any one of the three branches into the powers, functions and tasks that fall within the domain of the other wing. The three branches have to respect the constitutional division and not disturb the allocation of roles and functions between the triad. Adherence to the constitutional scheme dividing the powers and functions is a guard and check against potential abuse of power and the rule of law is secured when each branch observes the constitutional limitations to their powers, functions and roles.

Concluding Observations:

Montesquieu's theory of separation of powers was a reaction against despotic governments. He wrote in an era when governments were considered as inherently dangerous to the liberty of the individual. Hence, the government which governed the least was considered to be the ideal form of government. It was the concept of a police state; where it was proposed to give absolutely minimum functions to the government. But in the modem times, the concept of the government has totally changed and it is impossible to think that the government would only perform a negative role. The modern state is a 'welfare state', and there is a progressive expansion in the functions of the state. There is a need for economic planning for the integrated development of each and every individual. To achieve this goal, the state has to play a very positive and dynamic role. Thus, in present scenario the individual depends on the state for every type of development, progress and protective activities otherwise he cannot do anything meaningful.

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[32] *Kalpana Mehta v. Union of India*, Writ Petition (Civil) No. 558 of 2012 decided on 9 May, 2018

[33] Writ Petition (Civil) No. 738 of 2016 decided on 5 September, 2019